DATUK ABDUL GHAPUR HJ SALLEH

v.

CH'NG BOON HENG, THE CHIEF EDITOR OF NEW SABAH TIMES & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[SUIT NO: K23-07-2000]
26 JANUARY 2002

TORT: *Defamation - Libel - Press statement and publication in newspapers - Natural and ordinary meaning of words used - Whether defamatory - Justification - Whether defence available - Rules of the High Court 1980, O. 78 r. 3 - Whether appeal against striking out defence to be granted*

The defendants/appellants published an article in their newspaper which mentioned that the plaintiff/respondent was involved in securing government projects. In forwarding a defamation claim, the plaintiff alleged that the words used in the said article had tarnished his character and reputation as a State assemblyman and businessman.

The defendants, in defence, raised the plea of justification and submitted that the words used in the said article were not defamatory as it was a fair and accurate report of a writ of summons and a statement of claim involving a suit commenced by one Abdul Rahim Khan against his nephew, one Gullam Hassan Yacob.

The plaintiff applied to the senior assistant registrar under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the defendants' defence and it was subsequently granted. This was an appeal against the said decision.

Held:

[1] Words complained of are capable of defamatory meaning and would in fact be defamatory where such words were calculated to expose a plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower him in the estimation of right-thinking members of society generally. (p 361 d-e)

[2] The relevant portions contained in the said article which made reference to the respondent were capable of defamatory meanings in the way they were ascribed to in the statement of claim and in fact they were defamatory of the plaintiff. (p 361 g)

[3] Order 78 r. 3 of the RHC requires that particulars must be given if a plea of justification is employed in a defamation case. However, para. 4 of the defendant's defence did not contain any such particulars and based on this single factor, the plea of justification should fail. (p 362 d)

[4] It could not be accepted that the words used in the said article were merely a report of a pending court action and its nature. The effect and result of the relevant words was the disclosure of details in the pending action as much as possible, including allegations that were plain heresay, to the general readers of the newspaper when such issues and allegations therein could very well be contested as to their truth or veracity. (p 364 d)

[5] Reporting the commencement of an action with the gist of the cause of action may be a 'public act or event' and a manifestation of press freedom. But, a line must be drawn. If in a statement of claim, there was an allegation of evidential and heresay in nature, as in the present case, and a party deems it suitable to publish it, a plea of justification is not available in a subsequent action for libel for that publication. (p 367 a-h)

[Appeal dismissed with costs to be taxed unless agreed.]

Case(s) referred to:

Abbas Ismail Rowland v. Institut Analisa Sosial (INSAN) & Ors [1985] 1 CLJ 440; [1985] CLJ (Rep) 368 ***(not foll)***

Boustead Trading Sdn Bhd (1985) v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(dist)***

Cadam & Ors v. Beaverbrook Newspapers Ltd [1959] 1 All ER 453 ***(not foll)***

Stern v. Piper & Ors [1996] 3 All ER 385 ***(foll)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19, O. 78 r. 3(2)

For the appellants/defendants - Richard Barnes; M/s Shelley Yap Leong Tseu Chong Chia & Co

For the respondent/plaintiff - Ansari Abdullah; M/s Ansari & Co

Reported by M Maheswaran

JUDGMENT

Richard Malanjum J:

On 2 January 2002 I dismissed with costs to be taxed the appeal by the appellants/defendants against the order of the learned deputy registrar given on 8 June 2001 allowing the application by the respondent/plaintiff made pursuant to O. 18 r. 19 of the Rules of the High Court 1980 (RHC). When delivering my verdict I indicated that I would give my reasons later. I do so now.

It was the case of the respondent/plaintiff that on 30 March 2000 the appellants/defendants published an article entitled 'Pengarah syarikat kemuka saman terhadap sepupunya' in the Bahasa Malaysia segment of the local daily the 'New Sabah Times'.

For convenience I should reproduce the article *in toto*. And it reads thus:

> Pengarah syarikat kemuka saman terhadap sepupunya
>
> OLEH MARIAYATI MURSHIDI
>
> KOTA KINABALU: Seorang Pengarah dan Pemegang Saham Syarikat Kyeryong-Harusmas Sdn Bhd kelmarin mengemukakan saman terhadap sepupunya supaya mengembalikan wang berjumlah RM1.5 juta kepadanya dan menuntut gantirugi berhubung kegagalannya mendapatkan satu projek bernilai RM38 juta untuk melebarkan kawasan pelabuhan Kota Kinabalu.
>
> Abdul Rahim Khan Haji Hakim Khan memfailkan saman terhadap sepupunya Gullam Hassan Yacob, melalui Peguamnya Sugumar Balakrishnan di Pejabat Pendaftar Mahkamah Tinggi di sini.
>
> Dalam kenyataan samannya itu, Rahim mendakwa bahawa pada 8 Mei 1997 Gullam memberitahunya bahawa dia membayar RM1 juta kepada bekas Timbalan Ketua Menteri merangkap Menteri Kewangan Datuk Ghapur Salleh dan RM500,000 kepada Pengerusi Lembaga Pelabuhan-pelabuhan Sabah (LPPS) Datuk Hussein Wahid Dally untuk mendapatkan projek berkenaan.
>
> Bagaimanapun menurut Rahim, kedua-duanya enggan mengembalikan wang itu apabila beliau tidak memperolehi projek berkenaan.
>
> Rahim juga mendakwa bahawa Gullam telah menipunya yang mana Gullam bertindak sebagai wakil dalam rundingan itu serta mendorongnya membayar RM1.5 juta pada 21 Disember 1994.
>
> Dalam rundingan antara mereka, Gullam memberi jaminan kepada Rahim bahawa jika dia membayar RM1.5 juta secara tunai, pihak LPPS akan memberikan projek itu kepada syarikat kepunyaan Rahim itu.
>
> Bagaimanapun Rahim mendakwa, tindakan Gullam sebagai wakil dalam rundingan itu adalah palsu dan tidak benar.
>
> Ini kerana menurutnya pada 1 Mac lalu dia baru pertama kali mendapat tahu bahawa sepupunya itu pernah diisytiharkan muflis sejak 13 Februari 1986 dan dibebaskan daripada tindakan itu pada 26 Januari 1996.
>
> Dia juga mendakwa bahawa Gullam ada mengemukakan satu sijil deposit dari Singapore Citybank atas nama anaknya Norisham dan isterinya Saar Mulok @ Bibi Zubaidah bagi menyokong perwakilannya dalam rundingan mengenai projek itu.

Tambah Rahim lagi, pada 12 Disember 1994, Gullam ada menunjukkan kepadanya satu salinan catatan bertulis (tulisan tangan) oleh Datuk Ghapur Haji Salleh bagi menyokong tuntutannya bahawa syarikat Rahim akan menerima projek bernilai RM38 juta itu.

Beliau berkata, pada 19 Oktober 1995, dia bersetuju memberikan tempoh tambahan enam bulan lagi kepada Gullam untuk mendapatkan projek itu atau mengembalikan wang RM1.5 juta serta membayar RM1.5 juta lagi sebagai gantirugi.

Rahim memberikan satu syarat kepada Gullam, jika Gullam tidak mempersetujui syarat-syaratnya itu dalam tempoh 24 jam, dia akan membuat laporan polis.

Menurut Rahim, pada 20 Oktober 1995 Gullam menyerahkan kepadanya satu perisytiharan yang dibuat oleh Gullam sendiri di Mahkamah Tinggi Kota Kinabalu pada hari yang sama, mengesahkan resit bernilai RM1.5 juta dan bersetuju dengan syarat-syarat yang diberikan oleh Rahim.

Bagaimanapun, Rahim mendakwa sehingga kini syarikatnya masih belum memperolehi projek itu dan mengalami kerugian berjumlah RM1.5 juta.

Akibat kegagalan syarikatnya untuk mendapatkan projek itu serta mendapatkan semula wang RM1.5 juta yang diberikan, Rahim kemudiannya membuat laporan polis pada 3 Mac lalu.

Katanya, akibat daripada kejadian itu dia mengalami tekanan mental dan penderitaan serta kehilangan semua wang simpanannya.

Dalam tuntutan samannya, Rahim menuntut wang RM1.5 juta dikembalikan kepadanya termasuk faedah yang bernilai RM1.5 juta sebagai bayaran gantirugi.

The English translation is as follows:

Company director filed suit against his cousin

BY MARIAYATI MURSHIDI

KOTA KINABALU: A director and shareholder of Kyeryong-Harusmas Sdn Bhd yesterday filed a suit against his cousin seeking the return of RM1.5 million and damages on his failure to secure a project worth RM38 million to expand the port of Kota Kinabalu.

Abdul Rahim Khan Haji Hakim Khan filed the suit against his cousin Gullam Hassan Yaacob, through his counsel Sugumar Balakrishnan at the office of the High Court Registrar.

In his statement of claim, Rahim alleged that on 8th May 1997, Gullam informed him that he had paid RM1 million to the ex-Deputy Chief Minister cum Finance Minister Datuk Ghapur Salleh and RM500,000.00 to the Chairman of Sabah Ports Authority (SPA) Datuk Hussein Wahid Dally to secure the said project.

However according to Rahim, both of them refused to return the money when he failed to obtain the project.

Rahim also alleged that Gullam had cheated him wherein Gullam acted as a representative in the negotiations and had induced him to pay RM1.5 million on 21 December 1994.

In the negotiations between them, Gullam had guaranteed to Rahim that if he pays RM1.5 million in cash, SPA will award the project to Rahim's company.

However Rahim alleged that, Gullam's act as a representative in the negotiations was false and untrue.

This is because according to Rahim on 1st March this year, he discovered for the first time that Gullam was declared a bankrupt since 13th February 1986 and was discharged on 26th January 1996.

He also alleged that Gullam had shown him a fixed deposit certificate from Citybank Singapore in the name of his son Norisham and his wife Safar Mulok @ Bibi Zubaidah to support his representation in the negotiations for the said project.

Rahim further alleged that on 12th December 1994, Gullam had shown him a photocopy of a written note (handwritten) by Datuk Ghapur Hj Salleh to support his claim that Rahim's company will obtain the RM38 million project.

He said that on 19th October 1995, he agreed to give Gullam an extension of time of six months to either obtain the project or refund the RM1.5 million and pay another RM1.5 million as compensation.

Rahim gave a condition to Gullam that if Gullam did not agree to his offer within 24 hours, he will lodge a police report.

According to Rahim, on 20th October 1995, Gullam delivered to him a delcaration made by Gullam himself at Kota Kinabalu High Court on the same day, to confirm a receipt in the sum of RM1.5 million and agreed to the conditions imposed by Rahim.

However, Rahim alleged that until today his company have still not secured the said project and that he had lost RM1.5 million.

As a result of his company's failure to obtain the project and secure the return of the RM1.5 million that he had given, Rahim lodged a police report on 3rd March this year.

He said that as a result of the incident he sustained mental anguish, suffering and losts of his savings.

In his suit, Rahim demanded the return of 1.5 million to him including interest at RM1.5 million as damages.

In his statement of claim the respondent/plaintiff alleged that the article was defamatory of him and his person. The relevant portions of the pleadings state thus:

7. By the words complained of in paragraph 5 of the above in their literal meaning the Defendants meant and were understood to mean that, *inter alia*:

   (a) that the Plaintiff had received RM1.0 million from Abdul Rahim Khan Haji Hakim Khan (hereinafter will be referred to as "Abdul Rahim");

   (b) that the Plaintiff had received the said RM1.0 million to secure a Port Authority project for Abdul Rahim;

   (c) that the Plaintiff refused to return the RM1.0 million when he failed to secure the project for Abdul Rahim;

   (d) that the Plaintiff made an endorsement in writing to support Gullam's claim that Abdul Rahim's company will secure the project.

8. Further or in the alternative, by the words complained of in paragraph 5 above, in their natural and ordinary meaning, the Defendants meant and were understood to mean that:

   (a) the Plaintiff is a corrupt person who received money in return for securing the Port Authority project;

   (b) the Plaintiff had cheated Abdul Rahim of RM1.0 million by not returning the money after failing to secure the project;

   (c) it is the Plaintiff's practice to ask for large sum of money in return for securing projects;

   (d) the Plaintiff is not a fit and proper person to be elected as a member of the State Assembly and/or be appointed to any public office including cabinet appointments;

   (e) the Plaintiff cannot or should not be trusted, believed or relied on as a politician, leader of a political party or the leader of the government of the state of Sabah;

   (f) the Plaintiff is dishonest, untrustworthy, deceitful, a cheat and a corrupt person.

9. In consequence, the Plaintiff's character, credibility and reputation as a person, politician and businessman has been seriously damaged and he has suffered considerable distress and embarrassment and he has been brought into public scandal, odium and contempt.

10. The words complained of in paragraph 5 above are calculated to disparage the Plaintiff in his office, profession or calling as a State Assemblyman, politician and/or businessman, held or carried on by the Plaintiff at the time of their publication.

11. Further, the Defendants published the words complained of in paragraph 5 above out of malevolence or spite towards the Plaintiff.

Paragraph 1 of the statement of claim gave the background of the respondent/plaintiff in that he was the deputy chief minister from 1995 to 1997. It was also asserted that he held various positions in Sabah Government and was the State Assemblyman for the Merotai constituency from 1981 to 1985 and 1994 to 1999. The respondent/plaintiff was also the State Minister for Finance and/or State Minister of Communications and Works from 1994 to 1999. It was also pleaded that the respondent/plaintiff is a businessman and a well known politician in Malaysia particularly in Sabah. Presently the respondent/plaintiff is the State Assemblyman for the constituency of Kalabakan and the divisional chief for UMNO Tawau Division.

The appellants/defendants filed their defence to the claim asserting the following, *inter alia*:

3. Save that the Defendants deny that the said article was defamatory of the Plaintiff in the way of his office, profession or calling the Defendants admit paragraph 5 of the Statement of Claim.

4. The said words complained of are a fair and accurate report of the Writ of Summons and Statement of Claim under Suit No. SK. 22-63-2000 wherein the Abdul Rahim Khan Bin Hj Hakim Khan is the Plaintiff and Gulam Hassan Bin Yacob is the Defendant filed in the High Court of Sabah and Sarawak at Kota Kinabalu on 29th March, 2000 and were published contemporaneously with the filing of the said Suit and without any malice towards the Plaintiff.

5. Further or in the alternative the Defendants deny that the words bore or were understood to bear or were capable of bearing to being understood to bear any of the meanings set out in paragraphs 7 and 8 of the Statement of Claim or any meaning defamatory of the Plaintiff.

6. The Defendants deny paragraph 9 of the Statement of Claim and will put the Plaintiff to strict proof thereof.

7. The said words were not calculated to disparage the Plaintiff in his office, profession or calling as alleged in paragraph 10 of the Statement of Claim.

8. The said words were not published out of malevolence or spite towards the Plaintiff as alleged in paragraph 11 of the Statement of Claim.

By summons in chambers dated 9 February 2001 (encl. 10) the respondent/plaintiff applied for the following orders, namely:

(a) That the 1st , 2nd and 3rd Defendants' statement of defence dated 10th November 2000 be wholly struck out under Order 18 Rule 19 of the Rules of the High Court 1980 on the grounds that:

(i) It discloses no defence; and/or

(ii) It is scandalous, frivolous or vexatious; and/or

(iii) It may prejudice, embarrass or delay the fair trial of the action; and/or

(iv) it is otherwise an abuse of the process of the court.

(b) That judgment be entered against the 1st, 2nd and 3rd Defendants;

(c) Damages to be assessed;

(d) Costs of this application to be paid by the 1st, 2nd and 3rd Defendants to the Plaintiff;

(e) Other relief and/or orders that the court deems fit and proper to give.

The application was supported by an affidavit of the respondent/plaintiff affirmed on 8 February 2001 (plaintiff's affidavit) and filed therein.

The appellants/defendants filed an affidavit in opposition affirmed by Ch'ng Boon Heng on 20 February 2001 (Ch'ng's affidavit). In the said affidavit the points raised in the defence were repeated.

In her grounds of decision the learned deputy registrar found, *inter alia*, that the publication referred to the respondent/plaintiff. She also stated that for the defence of justification to succeed the appellants/defendants must expressly plead the same. And she also found the words complained of to be defamatory of the respondent/plaintiff.

Before me learned counsel for the appellants/defendants argued that the pith of their defence is that 'the words complained of are accurate and fair report of the writ of summons and the statement of claim under Suit No. SK/22/63/2000' ('the pending action'). And he said that the pending action is yet to be tried. Learned counsel also posed a question: what would happen if the plaintiff in that suit is vindicated and yet his clients in the case at hand would have had already been made to pay damages for defamation? The cases of *Cadam and Ors v. Beaverbrook Newspapers Ltd* [1959] 1 All ER 453 and *Stern v. Piper & Ors* [1996] 3 All ER 385 were referred to. As regards the question of whether or not the words complained of were defamatory the appellants/defendants took the position that such an issue was not relevant and need not be considered.

For the respondent/plaintiff it was submitted that the defence of justification was not properly pleaded and that the 'repetition rule' applied thereby making the plea of the appellants/defendants susceptible to be struck out.

In my *ex-tempore* judgment I said *inter alia*:

> I have considered the issues raised in the application to strike out the defence and for summary judgment by the Plaintiff/Respondent and the points raised in the appeal by the Defendants/Appellants.
>
> Basically there are two main issues, namely, whether the words complained of are capable of defamatory to the Plaintiff/Respondent and whether they are in fact defamatory within the meanings ascribed to them by the Plaintiff/Respondent and whether the plea of justification can be sustained as to raise an arguable point for the case to go for trial.
>
> In respect of the first issue I find the words complained of were and are capable of defamatory meaning of the Plaintiff/Respondent and in fact defamatory in terms of their meanings ascribed to by the Plaintiff/Respondent in his Statement of Claim.
>
> As for the purported plea of justification I find that the plea has not been specifically pleaded in the way as expected.
>
> Further, even if the plea can be imputed from the pleadings of the Defendants/Appellants, I do not find the words complained of were merely to report a fact on the filing of the Writ of Summons with the Statement of Claim therein.
>
> The inclusion of the allegations therein, in particular, with reference to the Plaintiff/Respondent who is not a party in that suit, went beyond the mere reporting of a civil action having being commenced.
>
> I am inclined to think that the extent of the article transgressed into the arena of the 'repetition rule' as discussed in *Stern v. Piper & Ors* [1996] 3 All ER 385 and hence on that score alone the plea of justification has no place.
>
> I also noted that the Defendants/Appellants in publishing the words complained of made no attempt whatsoever to publish the versions of the other parties or at least there was nothing before me to that effect. Of course this point will be more relevant to the issue of damages since the plea of privileges has not been raised in this case.
>
> Accordingly, I dismiss the appeal of the Defendants/Appellants and affirmed the decision of the learned Deputy Registrar granting the application of the Plaintiff/Respondent.
>
> I will give my full grounds in the event of further appeal.
>
> Costs to the Plaintiff/Respondent for this appeal to be taxed unless agreed.

Now, there were two basic issues to be dealt with in determining the case, namely whether the words complained of were defamatory of the respondent/plaintiff and whether the purported plea of justification by the appellants/defendants amounted to a defence of justification thereby entitling the case to go for a full trial.

There was no denial that the words complained of were published by the appellants/defendants and that the respondent/plaintiff was referred therein.

But were the words complained of capable of defamatory meaning and were in fact defamatory of the respondent/plaintiff? What is the meaning that the words complained of convey to the ordinary man? Under the English practice the first limb of the question would have been for the trial judge to consider while the second limb would have been for the jury to decide. In Malaysia however defamation trials are heard by a single judge. So those questions have to be considered by a judge sitting alone. Thus, I would say that in view of such a position even at an interlocutory stage those questions can be considered and a ruling made accordingly.

Words complained of are capable of defamatory meaning and would in fact be defamatory if such words were calculated to expose a plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower him in the estimation of right-thinking members of society generally. Mohamed Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p. 58 said:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

Having perused the article with particular reference to the portions which mentioned the respondent/plaintiff I found that they were capable of defamatory meanings in the way they were ascribed to in the statement of claim and in fact they were defamatory of the respondent/plaintiff. And I so ruled although learned counsel for the appellants/defendants took the stand that it was irrelevant whether the words complained of were capable and in fact defamatory in the way as pleaded in the statement of claim in view of the plea of justification as the main defence. As such the remaining issue to consider was whether such plea was properly pleaded and if so whether it could be relied upon in this case.

Learned counsel for the appellants/defendants argued that the plea of justification was properly pleaded in para. 4 of the defence. He submitted that the truth was that the words complained of were merely a report of the filing of the writ of summons and the statement of claim and their contents. Learned counsel contended that the words complained of were not a repetition or hearsay and that it was not the intention of the appellants/defendants in raising the plea of justification to prove that the respondent/plaintiff did the act or acts stated in the said article.

Foremost the way the purported plea was pleaded should be noted. Order 78 r. 3(2) states:

> (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

Thus it is a requirement of the RHC that particulars must be given if a plea of justification is employed in a defamation case. In the instant case para. 4 failed to do just that. Hence on this point alone that the plea could not be sustained.

In fact in the case of *Cadam v. Beaverbrook Newspapers Ltd* [1959] 1 QB 413 a case that was heavily relied upon by learned counsel for the appellants/defendants before me, the plea of justification was made and particulars were given. Accordingly I do not think the appellants/defendants should be allowed to depart from such a requirement by taking refuge to what was said in the case of *Boustead Trading Sdn Bhd (1985) v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283. There it was dealing with the issue of estoppel in which there was no equivalent to O. 78 r. 3 to confront with in the first place.

Notwithstanding my earlier view on the procedural position of the plea I took the liberty to consider whether in this case the defence of justification had raised an arguable case thereby requiring a full trial.

Reliance was placed on the case of *Cadam v. Beaverbrook Newspapers Ltd (supra)* to substantiate the contention that in a libel action where the words complained of were in the nature as in the present case a defence of justification could not be simply struck out. In that case a daily newspaper published an article stating that a writ had been issued naming four persons for conspiracy. In the original defence the owners of the newspaper pleaded that the words complained of did not and could not bear any meaning

defamatory of the plaintiffs. Later on the defendant newspaper owners sought for leave to amend their defence by adding an alternative plea of justification supported by particulars. The application was allowed. On appeal by the plaintiffs it was held by the Court of Appeal that 'if the words published bore a defamatory meaning, a defence of justification could be supported by a plea that the defendants had merely stated truly that a writ had been issued and its contents was an arguable question'.

But in a recent case of *Stern v. Piper and Ors* [1996] 3 WLR 715 a newspaper published an article making an adverse comments about the plaintiff's conduct quoting an affirmation prepared in connection with a pending High Court case for debt against the plaintiff. The plaintiff took exception to the article and commenced an action against the journalist, the financial editor and the proprietor of the newspaper. The defendants pleaded justification on the ground that the words were substantially true and gave the details of the affirmation. The plaintiff sought to strike out the plea of justification. The master and the High Court judge refused to allow the application. On appeal to the Court of Appeal it was held that 'the report in the article of statements in the affirmation, being essentially hearsay, fell directly within the rule that it was no defence to an action for defamation for the defendant to prove that he was merely repeating what he had been told; that the article was not protected by the privilege attaching to fair and accurate reports of proceedings in open court, since the privilege did not extend to court documents which had not been brought into the public arena; that the case did not belong to the limited category of cases in which, although the communication was not privileged, it was open to a defendant to plead that his repetition of the defamatory material was true or bore a lesser defamatory meaning than the original publication; and that, accordingly, the plea of justification would be struck out'.

It was urged upon this court by learned counsel for the appellants/defendants that the decision in *Cadam (supra)* should be followed as it had not been overruled by *Stern (supra)*. With respect in the circumstances of this case I could not agree with the contention of learned counsel. In fact what was held in *Cadam* was not that the plea of justification succeeded but that it was an arguable point thereby rendering the issue to remain as part of the amendment to the defence. And I think there are distinguishing factors between the present case and *Cadam*. Firstly, the words complained of should be noted. In *Cadam* the words complained of were these:

> ZENA DANIELS GETS A WRIT. Mr. Percy Oakley, 67-year-old former company director, of Sutton Coldfield, said last night that his solicitor had issued a writ claiming £350,000 damages for alleged conspiracy to deprive him of his interests in certain limited companies. He named: Miss Zena Daniels, the racehorse owner and company director; her father, Mr. David Daniels; Mr. Reginald Noakes ... Mr. Oakley's former partner; and Mr. John E. Cadam ...

> once Mr. Oakley's private secretary. ... Mr. Oakley said: 'A writ has been issued, and I have been told by my solicitor that it has been served. The companies were: [there followed a list of four companies with their addresses]. I was originally managing director of those four companies. Mr. Daniels and Miss Daniels took over by arrangement.

I am of the view that the words complained of in *Cadam* paled in comparison to what appeared in the present case. In *Cadam* the words complained of contained the fact that an action had been commenced and briefly the cause of action. There was no reference or reproduction of the actual contents of the statement of claim or the evidential aspect of the case. Whereas in the present case the scope and depth of the article in which the words complained of appeared to have literally reproduced the statement of claim. The news that was intended to be broadcasted was no longer just to reveal that an action with its cause had been commenced. I would say that the present case was in same category as in *Stern* where the words complained of were taken from an affirmation in a pending court action. The effect and result of the article with the words complained of was the disclosure of details in the pending action as much as possible, including allegations that were plain hearsay, to the general readers of the newspaper when such issues and allegations therein could very well be contested as to their truth or veracity. For instance part of the words complained of stated thus:

> ... Rahim alleged that on 8th May 1997, Gullam informed him that he paid RM1 million to the ex-Deputy Chief Minister ... .

Hence I do not think it could be said that the article with the words complained of in the present case was only a report of a pending court action and its nature. It went far beyond that intention. As such I do not think that the decision in *Cadam* could be applied in the circumstances of the case. Secondly, the plaintiffs in *Cadam* were parties directly connected to the pending court action. But in the present case the respondent/plaintiff was not involved but was only mentioned in the statement of claim due to certain allegations made by the plaintiff in the said pending action. And some of those allegations as repeated by the plaintiff in that pending action seemed to originate from third parties as well. Yet none of these were spared from publication by the said newspaper. I could not therefore see how this present case could fit into the pattern of *Cadam*. In my view it was more consistent with *Stern* and thus fell within the 'repetition rule' thereby precluding the plea of justification. In *Stern*'s case his Lordship Hirst LJ said this at pp. 719-724:

> The plaintiff relies on the well-established rule of the law of justification that "It is no defence to an action for defamation for the defendant to prove that he was merely repeating what he has been told:" see *Duncan & Neill on Defamation,* 2nd ed. (1983), p. 55, para. 11.16 under the heading "Rumour or

hearsay." I shall refer to this in future as "the repetition rule." Mr. James Price on behalf of the plaintiff submits that this rule precludes the present plea.

The defendants do not contest the validity of the repetition rule. However, Mr. Eady submits that in the present case it has not been infringed; the correct approach, he says, is to ask whether this plea goes to any conceivable meaning which the jury might reasonably hold the words to bear, and he submits that, on the authority of two cases in this court cited later in this judgment, the present plea arguably meets this test, as the judge held.

Both sides rightly invited us to approach the case on principle, rather than to sidestep the issue on the grounds that the answer might not presently be so manifestly plain and obvious as to justify a striking out order at this stage.
...

At the forefront of Mr. Price's argument was the submission that the case falls fairly and squarely within the repetition rule, which he submitted applies precisely to the report of the contents of Mr. Gorman's affirmation, which is a hearsay report of what Mr. Gorman affirmed; from this it follows, in the words of Lord Devlin, that it is the same as a direct statement, and that is all there is to it.

Mr. Price did not for present purposes seek to challenge the decisions in *Cadam*'s case [1959] 1 Q.B. 413 and *Waters* case [1961] 1 W.L.R. 967, but he submits that their ambit is strictly limited to reports of the issue of a writ or of the institution of other legal proceedings (which, he says, constitute public acts or events), or reports of public judicial pronouncements. By contrast, he says, the statements relied upon in Mr. Gorman's affirmation are not public material at all. If, he asked, the *Cadam/Waters* principle applied to such statements, what would be left of the repetition rule?

Mr. Price stressed that, as is common ground, this publication is not protected by either absolute or qualified privilege, since those defences only cover fair and accurate reports of proceedings in open court, in the former case reports published contemporaneously in a newspaper or other media, and in the latter case reports whenever published, unless the plaintiff alleges and proves that the publisher was actuated by express malice.

Mr. Eady in his argument strongly relied on the *Cadam* and *Waters* cases, and submitted that the same principle applies in the present case, the acid test being whether the meaning sought to be justified is one which the words are reasonably capable of bearing. There is, he said, no authority to distinguish an affidavit from other court documents such as a writ or statement of claim, nor can any valid distinction be drawn between an allegation in a writ (*Cadam*), the evidence to support that allegation (the present case), and judicial pronouncements *(Waters)*. He submitted that the essential question is to determine what is the range of possible meanings, which, in the words of Lord Devlin, is the fundamental question to which one always goes back. If in the present case the words are held by the jury to convey guilt, ie, that there is no smoke without fire, then the defence will fail.

> Mr. Eady did not challenge the repetition rule, but submitted that it does not apply here, on the footing that where republication is of what he described as "a second order" allegation, ie, a republication of an original allegation (in the present case by republishing Mr. Gorman's affirmation), it falls outside the repetition rule, and is justifiable by proving that the original allegation was in fact made. If on the other hand the republication conveys in any way that the allegation is true, then its substance must be justified. Mr. Eady acknowledged that his formulation of the "second order" test applied primarily to reports of legal proceedings, which he suggested a reasonable reader would approach in a sceptical frame of mind, not assuming that the allegation was well founded, but inferring that it represented one side only of a current dispute. This he sought to contrast with what he called a village rumour, which he said would have no point unless it was conveying the truth.
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> He submitted that the defence of justification may be maintainable in a case such as the present where a defence of privilege (absolute or qualified) would not be available, though where, as here, the publisher anticipates the open court proceedings, and so has no privilege defence, he does so at his peril; but provided he chooses his words carefully, as Lord Devlin said, he may succeed in being able to justify them. As a matter of legal policy Mr. Eady submitted that if the plaintiff is right, the media would never be able to report legal proceedings unless or until they were heard in open court and therefore potentially protected by privilege, which would be an unwarranted fetter on free speech.
>
> These arguments on both sides were extremely well presented, and I have not found this an easy case to decide. Undoubtedly there is very considerable force in Mr. Eady's submission that this case falls into the *Cadam/Waters* category, and that it would, if Drake J.'s judgment was upheld, carry those two cases only a very short step further forward. However in the end I have firmly concluded that, in the face of the repetition rule, Mr. Eady's argument cannot prevail.
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> ...
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> I would thus hold that this plea of justification clearly falls foul of the repetition rule, and that it is therefore unsound in principle and should be struck out.

It might be said that in the present case it was only based on the writ of summons and the allegations in the statement of claim and thus within *Cadam* whereas in *Stern* it was a reference to an affirmation. I considered that argument and came to a conclusion that in the instant case in view of the way the article with the words complained of was published it could not be said that it was merely a publication of the writ and the allegations made in the statement of claim. I would say that the article with the words complained of was a synthesis of allegations and evidential materials so that it could not be said that it fell squarely within the *Cadam* principle. And in fact the portion

of the article that related to the respondent/plaintiff which contained the words complained of consisted of allegations that were evidential and hearsay in nature. I am therefore of the opinion that *Stern* principle should not be confined to where there is an affidavit or affirmation involved. If in a statement of claim there is an allegation of evidential and hearsay in nature, as in the present case, and a party deems it suitable to publish it, in a subsequent action for libel for that particular publication I do not think the plea of justification is available to that party.

It was submitted that it would be unfair if the appellants/defendants were made to pay damages to the respondent/plaintiff when in the pending action the respondent/plaintiff might be vindicated. In other words it was the wish of the appellants/defendants that the matter should be left in abeyance pending the disposal of the other suit. That might be well and good for the appellants/ defendants as they have nothing to lose for the time being. But for the respondent/plaintiff that would be a long wait to clear one's name. And what happens if the pending action is discontinued subsequently or that the parties settled it out of court which the respondent/plaintiff will have no part to play as he is not a party to begin with? I do not think the apprehension as presented should disallow the respondent/ plaintiff from seeking to clear his name within the shortest time possible.

Another undesirable aspect of the argument of the appellants/defendants if upheld to the extent they wanted this court to accept is that it could mean a license for anyone to defame another without having to worry of the consequences soon after. Take for instance the pending action that led to the filing of the present action. If it is accepted that the respondent/plaintiff should wait for the outcome of the pending action before launching a libel action he might by then be caught by the limitation period. And if he were to file his action and then wait for the outcome of the pending action there is nothing to prevent the appellants/defendants from making an application to strike out his action either for want of cause of action or prosecution. Of course the appellants/defendants could have applied for stay of this action pending the disposal of the pending action. But that avenue is not relevant here. It is therefore my view that to agree with the contention of the appellants/defendants would tantamount to creating a new class of 'defence' in libel action *albeit* temporarily it might be. Reporting a commencement of an action with the gist of the cause of action may be a 'public act or event' and a manifestation of press freedom. But I think a line must be drawn. If reporting of a commencement of a suit goes beyond mere reporting of an 'event' as indicated by the details in such report including allegations which are strictly speaking evidential in nature and probably hearsay then as I stated earlier that should not be excepted from the 'repetition rule' and in which case a plea of justification should be struck out.

In considering this instant case I was well aware of the absence of local authorities dealing with the issue raised herein. One reported case is *Abbas Ismail Rowland v. Institut Analisa Sosial (INSAN) & 5 Ors* [1985] 1 CLJ 440; [1985] CLJ (Rep) 368. Briefly the facts of that case were that the defendants published an article alleging that the plaintiff while as a deputy public prosecutor abused his position by inducing, threatening and cheating three villagers to sell their land to him below the market value. The article was reproduced from affidavits made by the three villagers for use in two related pending actions. The plaintiff found the article offensive and commenced a libel action against the defendants. In their re-amended defence the defendants pleaded qualified privilege, justification and the action being premature. And for the defence of justification the defendants relied on the case of *Cadam*. The plaintiff applied to set aside the re-amended defence pursuant to O. 18 r. 19 of RHC and the inherent jurisdiction of the court. In refusing the application the learned judge ruled, *inter alia*, that the motion of trial should proceed in order to give an opportunity to the defendants to establish the truth or otherwise of the libel. The learned judge also ruled that the principle in *Cadam* would equally be applicable even though the source of the article was the affidavits of the three villagers. With due respect, I declined to follow the ruling in that case. Firstly there was no indication of the manner the defence of justification was pleaded in that case. If it was on the basis that the defendants would prove the truth of the allegations in the impugned article then that would not be the same as justifying that an action had been commenced against the plaintiff. Secondly, it should be noted that the case was decided before the decision in *Stern*. It would have been interesting to note the approach taken by the learned Judge after having read the arguments in *Stern*. And thirdly the defendants in that case pleaded not only justification but also qualified privilege and pre-maturity of the action. Further, it seemed to me reading from the judgment that there was no discussion on the concept of the 'repetitive rule' in relation to the defence of justification.

Accordingly for the reasons above that I dismissed the appeal of the appellants/ defendants with costs to the respondent/plaintiff to be taxed unless agreed. And I therefore affirmed the decision of the learned deputy registrar allowing judgment to be entered for the respondent/plaintiff.